UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EARLINE E. DAVIS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 02-0797 (RMC)**
	)	
ELAINE CHAO, Secretary, United States Department of Labor,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM OPINION

Earline E. Davis complains *pro se* that the Employment and Training Administration (ETA) within the U.S. Department of Labor (DOL) discriminated against her based on her age (60) and race (African-American) and in retaliation for prior discrimination complaints when it failed to promote her to either of two advertised vacancies for which she was admittedly on the "Qualified Eligibles" list. DOL has filed a motion for summary judgment, defending its selections, and Ms. Davis has opposed its motion.

Based upon the arguments of the parties and the entire record, the Court grants DOL's motion for summary judgment with respect to all of Ms. Davis's retaliation claims, and her race and age discrimination claims stemming from DOL's failure to promote her to the position of Contract Specialist, GS-1102-13. In addition, the Court will grant DOL's motion for summary judgment with respect to Ms. Davis's age and race discrimination claims stemming from ETA's selection of Ms. Mingarelli over Ms. Davis for the position of Manpower Development Specialist, GS-142-13. Because genuine issues of material fact still exist regarding DOL's failure to promote Ms. Davis to

the Manpower Development Specialist position when Ms. Mingarelli failed to accept the position and DOL cancelled the vacancy notice, the Court will deny DOL's motion for summary judgement with respect to Ms. Davis's race and age discrimination claims stemming from the failure to promote at that time.

BACKGROUND[1]

Ms. Davis is presently employed as a GS-12 Audit Resolution Specialist at DOL. She has served as an Audit Resolution Specialist for ETA since 1984. She is primarily responsible for providing technical advice and guidance on audit issues relating to DOL's employment and training programs.

During the summer of 2000, ETA advertised two positions for which Ms. Davis applied. The first such position was for a GS-13 Contract Specialist located in the Office of Grants and Contract Management and involved advising the Job Corps Architecture/Engineering and Construction unit. This position required knowledge of procurement practices and principles of acquisition planning. The second position was for a GS-13 Manpower Development Specialist to provide technical assistance to local youth programs that provide service to youth service providers.

The Selecting Official for the Contract Specialist position was John Steenbergen. Two individuals were listed on the Certificate of Eligibles, Ms. Davis and Marissa Dela Cerna, both of

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[1] The background facts are taken from DOL's statement of material facts as to which there is no genuine issue, filed pursuant to LcvR 7.1(h). Ms. Davis did not file a separate statement as required by this Court's Local Rules. However, in her opposition she did identify two facts that she contends are in dispute. Therefore, this court will treat as conceded those facts in DOL's statement that Ms. Davis did not list as facts in dispute in her memorandum in opposition. *See* LcvR 7.1(h); *Jackson v. Finnegan, Henderson, Farabow, Garrett & Dunner*, 101 F.3d 145, 154 (D.C. Cir. 1996).

whom were interviewed.[2] Mr. Steenbergen selected Ms. Dela Cerna because she had more recent experience in negotiating and awarding architectural engineering and construction contracts. At the time of the selection, Ms. Dela Cerna was holding a GS-12 Step 4 position as a Senior Contract Specialist responsible for the procurement of major and complex architectural engineering services and construction services for twelve Job Corps Centers nationwide. In contrast, Ms. Davis's experience was primarily in audit resolution.

The Selecting Officer for the GS-13 Manpower Development Specialist position was Karen Clark. Two individuals were listed on the Certificate of Eligibles, Ms. Davis and Lynne Mingarelli, both of whom were interviewed.[3] Ms. Clark selected Ms. Mingarelli for the position because she had direct experience in overseeing both local and state grantees in the area of youth services, including providing technical assistance to state and local grantees. This was the exact kind of experience for which Ms. Clark was looking. At the time of her selection, Ms. Mingarelli was a GS-12 Manpower Analyst in the National School-to-Work Office of the Departments of Education and Labor. In contrast, Ms. Davis had no experience in providing advice on programmatic youth matters, although she had experience with the financial side of such programs.

Ms. Mingarelli declined the job offer. Ms. Clark thereafter cancelled the vacancy announcement. She did not offer the job to Ms. Davis although Ms. Davis had satisfied the requirements for inclusion on the Qualified Eligibles list.

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[2] Ms. Dela Cerna is an Asian female, age 42, with no prior EEO activity at the time of selection.

[3] Ms. Mingarelli is a White female, age 46, with no prior EEO activity at the time of selection.

PRIOR EEO ACTIVITY

Ms. Davis was one of the lead class members in a 1983 EEO complaint against ETA in which African American employees of the agency in its National Office advanced claims of race discrimination with respect to performance evaluation ratings, performance awards, promotions, rehiring and re-promotion. That matter was the subject of a formal Settlement Agreement in 1994. Among other provisions, it included $2.7 million in pay adjustments for class members and $1 million in a special training fund. Under the Settlement Agreement, "Claimants who participate in this education and training fund and complete their development program will receive special consideration for promotion." Plaintiff's Opposition to Defendant's Motion for Summary Judgement, Exh. C at 2. Ms. Davis participated in the fund and completed a development program.

The Settlement Agreement had a definite life span. It specified that "This action shall be deemed finally dismissed with prejudice, and DOL shall have no further obligations whatsoever under this Agreement, upon the expiration of the term of the Agreement." *Id.* at 8. The term of the Settlement Agreement was five years. Therefore, it expired in 1999.

Mr. Steenbergen admittedly knew of Ms. Davis's prior EEO activity. Ms. Clark was not at the DOL at the time of the 1983 complaint or the 1994 Settlement Agreement and states that she had no prior knowledge of Ms. Davis's EEO activity until the instant charge was filed.

Soon after the non-selections, Ms. Davis filed charges under Title VII, as amended, 42 U.S.C. §2000e *et seq.* She has exhausted her administrative remedies and brings this action to the Court.

LEGAL STANDARD FOR SUMMARY JUDGMENT

Summary judgment is not "a disfavored procedural shortcut." *Celotex Corp. v. Catreet*, 477 U.S. 317, 327 (1986). Rather, it is a way to provide "the just, speedy and inexpensive determination

of every action." *Id.* (quoting FED. R. CIV. P. 1). Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Id.* at 322 (quoting FED. R. CIV. P. 56(c)). Material facts are those facts which, under the relevant substantive law, might affect the outcome of the suit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Id.* at 247-48 (emphasis in original). A genuine issue of material fact does not exist unless "there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." *Id.* at 249.

The party moving for summary judgment bears the burden of demonstrating that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). If this burden is met, the non-moving party must present specific evidence that a material factual dispute exists. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson*, 477 U.S. at 252; *see also Devera v. Adams*, 874 F. Supp. 17, 20 (D.D.C. 1995) ("Evidence of discrimination that is merely colorable, or not significantly probative cannot prevent the issuance of summary judgment.") (quoting *Johnson v. Digital Equip. Corp.*, 836 F. Supp. 14, 15 (D.D.C. 1993)). The court construes the evidence in the light most favorable to the non-moving party and draws all reasonable and justifiable inferences in its favor. *See Anderson*, 477 U.S. at 255.

> [U]nder *McDonnell Douglas*, to assert a successful Title VII claim, an employee must establish that the employer's asserted nondiscriminatory reasons for its adverse conduct were pretextual. *See McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 804, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); *Mungin v. Katten Muchin & Zavis*, 116 F.3d 1549, 1553-54 (D.C. Cir. 1997). Once an employer articulates a legitimate, nondiscriminatory reason for the challenged employment decision, the employer prevails unless the employee succeeds in discrediting the employer's explanation. *See Aka v. Washington Hosp. Ctr.,* 156 F.3d 1284, 1288-89 (D.C. Cir. 1998) (*en banc*). Since the ultimate burden of persuasion in proving retaliation remains with the plaintiff, summary judgment is appropriate when the employee is unable to satisfy this burden. *See Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981); *Paquin v. Fed. Nat'l Mortgage Ass'n*, 119 F.3d 23, 27-28 (D.C. Cir. 1997); *Chen v. Gen. Accounting Office*, 821 F.2d 732, 739 (D.C. Cir. 1987).

Samii v. Billington, 195 F.3d 1, 3 (D.C. Cir. 1999).

ANALYSIS

I. Race and Age Discrimination Claims

In order to establish a prima facie case of discrimination in a non-selection case, under the well-known standards set forth by the Supreme Court in *McDonnell Douglas*, a plaintiff must show i) that she belongs to a protected class; (ii) that she applied for and was qualified for a position; (iii) that, despite her qualifications, she was rejected; and (iv) that a person outside of the protected class was selected for the position. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Cones v. Shalala*, 199 F.3d 512, 516 (D.C. Cir. 2000). Ms. Davis has established a prima facie case of race and age discrimination with respect to each of the two vacancies. In response, the ETA has provided legitimate, nondiscriminatory reasons for selecting applicants other than Ms. Davis for the two vacancies. In each instance, the selected person offered more immediately relevant and objective work experience. Ms. Davis has been unable to discredit these explanations.

There is nothing in this record to challenge Ms. Dela Cerna's greater level of experience. At the time of her application, she was serving as a Senior Contract Specialist for the procurement of architectural and engineering construction services for twelve Job Corps Centers. She was familiar with the procurement and acquisition review process, regulations governing the contracting process, and the special terms and conditions in unusual contract circumstances. Ms. Davis has many years of service but they are relatively limited to the audit resolution process, giving her little exposure to architectural and engineering construction contracts because such contracts are generally set at a fixed price and are not subject to audit resolution. Attempting to show the reason ETA offers for her non-selection for the Contract Specialist position is pretextual, Ms. Davis argues that Ms. Dela Cerna was given an unfair advantage because Ms. Dela Cerna was transferred into the Grants and Contracts Office "in order to give her enough relevant experience to qualify for the job." However, this transfer occurred five years before the vacancy announcement, not shortly before, as Ms. Davis thought. There is insufficient record evidence to challenge Ms. Dela Cerna's transfer or to connect it to Ms. Davis's non-selection.

In her Complaint, Ms. Davis alleges that she was more qualified than Ms. Mingarelli because she had more years of experience in the duty areas required by the GS-12 Manpower Development Specialist position. In addition, she notes that she had experience as a GS-9 Manpower Development Specialist.[4] Ms. Davis did not, however, have any direct experience in providing technical assistance to local youth programs. Rather, her experience was limited to advising grantees on financial reporting matters. In contrast, Ms. Mingarelli had recent, direct experience providing

[4]Ms. Davis did not note her experience as a Manpower Development Specialist on her resume.

technical advice to local youth programs. ETA has provided a legitimate, nondiscriminatory reason for selecting Ms. Mingarelli over Ms. Davis, and Ms. Davis's allegations that she was more qualified are not sufficient to show ETA's reason is pretextual. *See Fischbach v. D.C. Dep't of Corr.*, 86 F.3d 1180, 1183 (D.C. Cir. 1996) (court's role is to determine whether employer's reason is a pretext for discrimination rather than to second-guess employer's evaluation of applicants' qualifications).

The Court is more troubled by Ms. Clark's cancellation of the Manpower Development Specialist vacancy after Ms. Mingarelli declined the job. ETA asks this Court to grant full summary judgement in its favor without addressing this part of the case. The Court recognizes that in her affidavit, which she submitted as part of an informal investigation and which is attached to the government's memorandum in support of its motion as exhibit H, Ms. Clark stated that she did not offer the position to Ms. Davis after Ms. Mingarelli declined because she felt Ms. Davis was not qualified for the position. However, the government does not mention, let alone explain, Ms. Clark's cancellation or the reason behind it in its statement of material facts, its memorandum in support of its motion for summary judgment, or in its reply brief.

As the non-moving party, Ms. Davis is entitled to all inferences in her favor. *See Anderson.*, 477 U.S. at 255. In addition, because she is proceeding *pro se*, the Court must construe her filings liberally. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Richardson v. United States*, 193 F.3d 545, 549 (D.C. Cir. 1999). Based on the arguments before the Court and the presumptions to which Ms. Davis is entitled, the Court is unable to say that there are no genuine issues of material fact regarding whether ETA discriminated against Ms. Davis based on her age and/or race when Ms. Clark cancelled the vacancy announcement instead of offering the position to Ms. Davis after Ms. Mingarelli declined it. Therefore, the Court will deny the government's motion for summary

judgement on this limited issue.

II. Retaliation

To present a prima facie case of retaliation a plaintiff must show "1) that she engaged in a statutorily protected activity; 2) that the employer took an adverse personnel action; and 3) that a causal connection existed between the two." *Brown v. Brody*, 199 F.3d 446, 452 (D.C. Cir.1999) (citations omitted). Assuming that Ms. Davis has satisfied the first two elements, she is unable to establish the causal connection necessary to satisfy the third element. Ms. Davis relies on the 1994 Settlement Agreement and its promise of "special consideration for promotion" to support her allegations of retaliation. Her complaint states that she has unsuccessfully applied for 20 promotions since the Settlement Agreement.[5] However, DOL's obligations to give class members special consideration ended in 1999, under the specific terms of the Settlement Agreement.

The *fact* of the 1994 Settlement Agreement and Ms. Davis's prominent role in it does not, after all this time, provide the necessary causal connection between her protected activity and her non-selection. Courts may infer a causal connection between protected EEO activity and alleged adverse action only when the time period between the two events is significantly less. *Clark County School Dist. v. Breeden*, 532 U.S. 268, 273 (2001) ("[T]he temporal proximity must be very close.") (internal quotations omitted). There are six years between the execution of the Settlement

[5] Without the facts of prior promotional opportunities before it, the Court is not in a position to address Ms. Davis's complaint that she has received no promotion after more than 20 attempts. What seems clear is that in the two instances of non-selection pending now, the selectees had objective and extensive experiences that were directly relevant to the positions and that were greater in degree and applicability than Ms. Davis's background.

Agreement and the non-selection, which is too long to provide the necessary connection.[6] *See Garrett v. Lujan*, 799 F. Supp. 198, 202 (D.D.C. 1992) (Almost a year "between Plaintiff's EEO activity and the adverse employment decision is too great to support an inference of reprisal."). Ms. Davis has no other evidence to support her retaliation claim other than the fact of this prior EEO activity, so that claim must fail under the law.

CONCLUSION

Ms. Davis has been unable to show that the reason ETA offers for its failure to promote her to the position of Contract Specialist is pretextual. Therefore, the Court will grant summary judgement in favor of DOL with respect to her race and age discrimination claims stemming from her non-promotion to this position. In addition, the Court will grant summary judgment in favor of DOL with respect to Ms. Davis's retaliation claims, as she is unable to establish the requisite causal connection between her protected activity and ETA's failure to promote her to either the Contract Specialist or the Manpower Development Specialist position. The Court will also grant DOL's motion for summary judgment with respect to Ms. Davis's age and race discrimination claims stemming from ETA's selection of Ms. Mingarelli over Ms. Davis for the Manpower Development Specialist position. However, genuine issues of material fact still exist with respect to Ms. Davis's claims of age and race discrimination stemming from ETA's failure to promote her to the position

[6] With respect to the Manpower Development Specialist position, the selecting officer, Ms. Clark, was not with DOL or ETA at the time of the Settlement Agreement and asserts without contradiction that she did not know of Ms. Davis's prior EEO activity. Ms. Davis suggests that Ms. Clark had knowledge of her prior EEO activity because, under the terms of the Settlement Agreement, all Selecting Officials must prepare a memo outlining the bases for their selections and Ms. Clark prepared such a memo. Such memos have undoubtedly become habitual at DOL between 1994 and 2000 for every selection made and the Court can draw no inference of knowledge from it.

of Manpower Development Specialist after Ms. Mingarelli declined the job. Therefore, DOL's motion for summary judgment with respect to this allegation is denied. A separate order will accompany this opinion.

ROSEMARY M. COLLYER
United States District Judge

Date: February _____, 2003